Denver Law Review

Volume 61
Issue 2 *Tenth Circuit Surveys*

Article 7

February 2021

Note, Statutes of Limitations in Civil Rights Actions - A Survey and Critique of Tenth Circuit Decisions

Marcie Bayaz

NOTE, STATUTES OF LIMITATIONS IN CIVIL RIGHTS ACTIONS—A SURVEY AND CRITIQUE OF TENTH CIRCUIT DECISIONS

OVERVIEW

Congress' failure to specify a statute of limitations for cases brought under the Civil Rights Acts[1] has presented numerous difficulties for the federal courts. The Supreme Court in *O'Sullivan v. Felix*[2] approved the application of state statutes of limitations to civil rights actions.[3] In *Board of Regents v. Tomanio*,[4] the Court held that 42 U.S.C. § 1988[5] required application of state statutes of limitations.[6] The Court, however, has provided little guidance to the lower courts as to which state statute of limitations is most appropriate.[7] This lack of guidance[8] has led to divergent approaches among the circuit courts[9] and, in some instances, to the application of different approaches within the same circuit.[10]

---

1. During the the Civil War era, Congress enacted a series of civil rights statutes which are collectively referred to as the Civil Rights Acts. *See* Comment, *Statutes of Limitation in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L.J. 98, 98 & n.1. The four Civil War civil rights statutes relevant to this comment are codified in title 42 of the United States Code. 42 U.S.C. § 1981 (1976) guarantees all citizens the right to contract, and the protection of the legal process, on the terms enjoyed by white citizens. 42 U.S.C. § 1982 (1976) guarantees all citizens the property rights enjoyed by white citizens. 42 U.S.C. § 1983 (Supp. V 1981) creates a civil remedy for persons deprived of federally secured rights by other persons acting under color of state law. 42 U.S.C. § 1985 (Supp. V 1981) creates a civil remedy for injury caused by conspiracies to deprive a person's civil rights, or to interfere with the equal administration of the law.

2. 233 U.S. 318 (1914).

3. *Id.* at 321-25. *Felix* held that because civil suits under the Civil Rights Acts are remedial in nature, a federal statute governing civil actions imposing fines or penalties was inapplicable. Given the absence of an explicit limitations period in the Civil Rights Acts, the district court properly applied a state limitation period. *Id.*

4. 446 U.S. 478 (1980).

5. 42 U.S.C. § 1988 (Supp. V 1981).

6. The court held that section 1988 requires application of state statutes of limitation unless the state law is "inconsistent with the constitution and the laws of the United States." Board of Regents v. Tomanio, 446 U.S. 478, 483-85 (1980). One commentator has concluded that section 1988 has been misinterpreted by the courts and that Congress never intended to incorporate state rules into federally created actions. Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499 (1980).

7. In the leading case of Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Court stated that the limited grant of certiorari foreclosed consideration of which state statute of limitation should be applied to an action under 42 U.S.C. § 1981. 421 U.S. at 462 n.7. In another section 1981 case, the Court also declined to examine the statute of limitations issue, stating: "We are not disposed to displace the considered judgment of the Court of Appeals on an issue whose resolution is so heavily contingent upon an analysis of state law. . . ." Runyon v. McCrary, 427 U.S. 160, 181 (1976).

8. The Court has stated that the federal courts should adopt the most analogous state statute of limitations. *Tomanio*, 446 U.S. at 483-84. This statement has failed to provide direction to the lower courts, however, because there is an ongoing debate as to which categories of state statutes of limitation are most analogous. For example, some circuits find tort statutes of limitation most analogous, while others find such statutes inherently inappropriate for federal civil rights actions. *See infra* notes 134-41 and accompanying text.

9. *See generally* Annot., 45 A.L.R. FED. 458 (1979); Annot., 29 A.L.R. FED. 710 (1976).

10. Various panels of the Eighth Circuit had taken inconsistent approaches to the application of state statutes of limitation. This conflict was finally resolved in Garmon v. Foust, 668

During this survey period, the Tenth Circuit grappled with statute of limitations issues, but did not articulate a precise standard. Accordingly, this comment will examine recent Tenth Circuit decisions involving the statute of limitations to be applied in civil rights actions. The analysis will focus on two issues: whether the Tenth Circuit is using a consistent standard for selecting the appropriate statute of limitations, and whether the problems associated with the Tenth Circuit's approach can be alleviated by adopting of a different analysis.

I. ALTERNATIVE STATUTE OF LIMITATIONS APPROACHES

A. *The Direct Analogy Approach*

The methods adopted by the various circuit courts for selecting the analogous state statute of limitations in civil rights cases can be divided into two general categories: the direct analogy approach and the uniform analogy approach. The courts in the first category analogize the alleged violation of federal rights to a common law tort or contract claim based upon the specific facts pled in the complaint. The practical application of this method is typified by the view of the Third Circuit that federal courts hearing cases under the Civil Rights Acts determine the analogous cause of action under state law, and then apply the limitation period which would have been applied had that action been brought in a state court.[11]

A direct analogy can be drawn with relative ease to intentional torts such as false imprisonment, assault, battery, and malicious prosecution.[12] Many cases arising under the civil rights statutes have no readily apparent common law counterpart, however, forcing the courts to draw contrived analogies. For example, in *Pennick v. Florala*[13] the Fifth Circuit considered a suit, based on sections 1982 and 1983 of the Civil Rights Acts,[14] alleging a lack of notice and opportunity to be heard prior to a zoning change which allowed a sanitary landfill to operate in the plaintiffs' neighborhood.[15] The court held that the alleged due process violations were analogous to a state court action for trespass on the case (subject to a one-year statute of limitations), rather than an action for trespass (subject to a six-year statute of limitations).[16] Obviously, both analogies were questionable characterizations of a due process violation. Further, because the direct analogy between the violation of a constitutional right and an action under common law is inherently imprecise, *Pennick* demonstrates that this approach allows the federal

F.2d 400 (8th Cir.) (en banc), *cert. denied*, 456 U.S. 998 (1982), which rejected the use of tort statutes of limitation, instead requiring the use of state statutes of limitation provided for liabilities created by statute, or similar generalized limitations statutes. 668 F.2d at 406 & nn.11-12.

11. Jennings v. Shuman, 567 F.2d 1213, 1216 (3d Cir. 1977).

12. In some states, even these analogies can be problematic. In *Jennings*, the federal court was forced to choose between a Pennsylvania statute providing a one-year limitation for malicious prosecution or false arrest, and a two-year limitation for claims based on false imprisonment and abuse of process. *Id.* at 1216.

13. 529 F.2d 1242 (5th Cir. 1976).

14. 42 U.S.C. §§ 1982, 1983 (1976 & Supp. V 1981).

15. 529 F.2d at 1243.

16. *Id.*

courts considerable flexibility in determining when a suit is barred by the statute of limitations.

B. *The Uniform Analogy Approach*

While the approach described above necessitates an individualized examination based on the facts of each case, the courts which employ the uniform analogy approach avoid this task by applying one statute of limitations to all civil rights actions. These courts view federal civil rights actions as intrinsically similar, and seek the state analogue for that intrinsically similar class of actions. Several different types of statutes have been utilized by courts employing this method. Some circuits apply general state "catch-all" statutes of limitations, which govern actions not otherwise provided for.[17] Another alternative used by some circuits is the uniform application of a state statute of limitations for actions based upon a liability created or imposed by statute.[18] Other courts have adopted the state limitation for suits involving injury to a person or her rights.[19] Finally, some states have enacted statutes of limitation which apply specifically to civil rights actions.[20]

II. THE TENTH CIRCUIT'S APPLICATION OF THE DIRECT ANALOGY APPROACH

A. *Early Cases*

Until recently, the Tenth Circuit had not developed a cogent approach to the problem of determining the appropriate statute of limitations in civil rights actions. In several early opinions, the court applied state statutes providing for a two-year limitation on "actions for injury to rights of another not arising on contract."[21] These opinions, however, do not include any substantive discussion of the court's rationale for using this two-year statute of limitations.[22]

---

17. *See, e.g.*, Garmon v. Foust, 668 F.2d 400 (8th Cir.) (en banc), *cert. denied*, 456 U.S. 998 (1982); Rinehart v. Locke, 454 F.2d 313 (7th Cir. 1971); Franklin v. City of Marks, 439 F.2d 665 (5th Cir. 1971).

18. *See, e.g.*, Pauk v. Board of Trustees, 654 F.2d 856 (2d Cir. 1981); Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977).

19. *See, e.g.*, Almond v. Kent, 459 F.2d 200, 204 (4th Cir. 1972) (concluding that every well-founded civil rights cause of action under section 1983 results in a "personal injury").

20. *See, e.g.*, Harrison v. Wright, 457 F.2d 793 (6th Cir. 1972), where the court applied TENN. CODE ANN. § 28-304 (1955) (current version at TENN. CODE ANN. § 28-3-104 (1980)), a statute of limitation explicitly applicable to federal civil rights actions. *But cf.* Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978), where the court refused to apply VA. CODE § 8-24 (1950), a one-year statute of limitation specifically governing section 1983 actions. The court characterized this limitation as an impermissible discrimination against a federal cause of action, 582 F.2d at 1319. This discriminatory provision has been eliminated from Virginia's current statutes of limitations framework. *See* VA. CODE. § 8.01-243 (1977); Steward v. Norfolk, F. & D. Ry., 486 F. Supp. 744 (E.D. Va. 1980), *aff'd*, 661 F.2d 927 (4th Cir. 1981).

21. Crosswhite v. Brown, 424 F.2d 495, 496 (10th Cir. 1970) (applying 12 OKLA. STAT. § 95 (1951)) (current version at 12 OKLA. STAT. § 95 (1981)); Wilson v. Hinman, 172 F.2d 914 (10th Cir.), *cert. denied*, 336 U.S. 970 (1949) (applying KAN. GEN. STAT. § 60-306 para. 3 (1935)) (current version at KAN. STAT. ANN. § 60-513(a)4 (1976)).

22. The opinions in both of these cases devoted only one paragraph to the statute of limitations issue. *See Crosswhite*, 424 F.2d at 496; *Wilson*, 172 F.2d at 915.

The case of *Zuniga v. Amfac Foods, Inc.*[23] marked the first time that the Tenth Circuit provided an in-depth analysis of the statute of limitations issue in civil rights actions. In this 1978 case, the plaintiff brought an action under section 1981 of the Civil Rights Act[24] against his employer, alleging that the plaintiff was refused reinstatement because of his national origin.[25] The employer argued that because more than four years had elapsed since Zuniga's cause of action accrued, the suit should be barred under either a two-year statutory limitation for federally created actions or a three-year "residuary" statute.[26] In the decision the court discussed, for the first time, the various approaches used in deciding which state statute of limitations was applicable to section 1981 actions. The court rejected the Seventh Circuit's method of applying a uniform limitation for all statutory claims,[27] instead adopting the Third Circuit's approach of analyzing the particular allegations of a civil rights claim and determining the comparable state analogue.[28] Utilizing this approach, *Zuniga* held that the appropriate Colorado statute of limitations was a six-year period for "[a]ll actions of assumpsit, or on the case founded on any contract or liability, express or implied" and for "[a]ll other actions on the case, except for slander and for libel."[29]

Zuniga selected the direct analogy approach because the court found that approach more consistent with the Supreme Court's decision in *UAW v. Hoosier Cardinal Corp.*,[30] which articulated the appropriate statute of limitations inquiry for actions brought pursuant to collective bargaining agreements. *Hoosier Cardinal* held first that Congress' failure to include a specific limitation period indicated an intent to adopt the "appropriate state statute of limitations."[31] Courts were therefore required to determine how state law would characterize the federal action, and then adopt the statute of limitations provided for the state analogue.[32] Further, although the question of the appropriate characterization was ultimately a question of federal law,[33] a state's characterization of the action was to be accepted unless unreasonable or inconsistent with federal policy.[34] Although the Tenth Circuit did not find *Hoosier Cardinal* controlling, they found that its analysis dictated use of the direct analogy approach under section 1981.[35] Applying that approach, they found Zuniga's action viable.[36]

Brogan v. Wiggins School District[37] was another civil rights case decided by

23. 580 F.2d 380 (10th Cir. 1978).
24. 42 U.S.C. § 1981 (1976).
25. 580 F.2d at 381, 387.
26. *Id.* at 382, 387. *See* COLO. REV. STAT. §§ 13-80-106, -108 (1973).
27. 580 F.2d at 383.
28. *Id.* (citing Meyers v. Pennypack Woods Home Ownership Ass'n., 559 F.2d 894 (3d Cir. 1977)).
29. 580 F.2d at 386 (quoting COLO. REV. STAT. § 13-80-110(1)(d), (g) (1973)).
30. 383 U.S. 696 (1966).
31. *Id.* at 703-05.
32. *Id.* at 706.
33. *Id.*
34. *Id.*
35. 580 F.2d at 383.
36. *Id.* at 386-87.
37. 588 F.2d 409 (10th Cir. 1978).

the Tenth Circuit in 1978. *Brogan* involved an employment discrimination case brought under section 1983.[38] The court noted that *Zuniga* had established the appropriate analogy for section 1981 actions, but did not engage in an analysis of the state law analogue to the employment discrimination claim.[39] Instead, the court declared that because section 1983 is based on a policy of protecting fundamental rights, when there is a choice between two statutes of limitations, the longer statute should be applied.[40]

In 1979, the Tenth Circuit affirmed the trial court's choice of a state statute of limitations in two cases. The first of these cases, *Hansbury v. Regents of the University of California*,[41] was a section 1983 employment discrimination case in which the trial court dismissed the plaintiff's claim as barred by New Mexico's four-year limitation for actions "founded on unwritten contracts . . . and all other actions not otherwise provided for."[42] The second case, *Spiegel v. School District No. 1*,[43] involved a Wyoming school teacher who sought damages under section 1983 for the termination of his employment in violation of his first amendment rights.[44] The Tenth Circuit affirmed the trial court's application of Wyoming's two-year limitation for "actions upon a liability created by a federal statute."[45]

In a 1980 case, *Brown v. Bigger*,[46] the Tenth Circuit in a per curiam opinion affirmed the lower court's dismissal of a civil rights action brought by an inmate at the Kansas State Penitentiary.[47] The plaintiff, Brown, alleged that the prison guards subjected him to cruel and unusual punishment during his incarceration.[48] The district court held that Brown's section 1983 suit was barred by Kansas' two-year statute of limitations for unenumerated injuries to the rights of another.[49] The Tenth Circuit, without discussion, agreed with the trial court's choice of the statute of limitations.[50]

Two months after *Brown* the Tenth Circuit decided *Shah v. Halliburton Co.*[51] In that employment discrimination action under section 1981 the court rejected the district court's application of Oklahoma's two-year limitation for "injury to the rights of another"[52] and applied Oklahoma's three-year statute of limitations for actions on an unwritten contract and actions

38. *Id.* at 410.

39. *Id.* a 412.

40. *Id.* Under Colorado law a court will always be presented with two possible statutes of limitations, because COLO. REV. STAT. § 13-80-106 (1973) provides that actions brought on liabilities created by federal statute must be brought either within two years or within a longer period provided for a comparable state action, if any. *Id.*

41. 596 F.2d 944 (10th Cir. 1979).

42. *Id.* at 949. *See* N.M. STAT. ANN. § 37-1-4 (1978).

43. 600 F.2d 264 (10th Cir. 1979).

44. *Id.* at 265.

45. *Id. See* WYO. STAT. § 1-3-115 (1977).

46. 622 F.2d 1025 (10th Cir. 1980).

47. *Id.* at 1026.

48. *Id.*

49. *Id. See* KAN. STAT. ANN. § 60-513(a)(4) (1976).

50. 622 F.2d at 1026. Brown's status as a prisoner tolled the statute of limitations, and therefore his claim was timely under section 60-513(a)(4). *See* 622 F.2d at 1026.

51. 627 F.2d 1055 (10th Cir. 1980).

52. *See* OKLA. STAT. tit. 12, § 95 para. 3 (1981).

upon a liability created by statute.[53] Judge Seymour, writing for a unanimous court, applied the reasoning of *Brogan*, which stated that when there is a choice between two statutes of limitations in a civil rights action, the longer limitation should apply as a matter of policy.[54]

In the following year, 1981, the Tenth Circuit considered a section 1982 housing discrimination action brought by a black purchaser of a home in a predominantly white development.[55] Although the court in *Denny v. Hutchinson Sales Corp.*[56] held for the defendant, it did state that the plaintiff's action was timely.[57] Addressing the limitations issue, the court first held that the time limitations of the Fair Housing Act[58] do not apply to a section 1982 suit.[59] The court, however, failed to indicate what the appropriate statute of limitations should be, concluding only that under Colorado law the applicable statute of limitations could not be less than two years, and the action was therefore timely.[60]

In *Childers v. Independent School District No. 1*,[61] a 1982 case, the Tenth Circuit held that the six-month limitation period of the Oklahoma Political Subdivision Tort Claims Act[62] was not applicable to claims brought under section 1983 because the short period was "inconsistent with the broad remedial purposes of the federal civil rights acts."[63] The procedural posture of *Childers* did not require the court to articulate the applicable statute of limitations.[64] The decision remains significant, however, because in rejecting the statute of limitations claim the Tenth Circuit accentuated the intrinsic difference between a state tort action and the alleged deprivation of a constitutional right.[65]

---

53. 627 F.2d at 1058. *See* OKLA. STAT. tit. 12, § 95 para. 2 (1981).

54. *Id.* at 1059. *See Brogan*, 588 F.2d at 410.

55. *See* Denny v. Hutchinson Sales Corp., 649 F.2d 816, 819 (10th Cir. 1981).

56. 649 F.2d 816 (10th Cir. 1981).

57. *Id.* at 820.

58. 42 U.S.C. §§ 3601-3631 (1976 & Supp. V 1981).

59. 649 F.2d at 820.

60. *Id. See* COLO. REV. STAT. § 13-80-106 (1973). As explained above, Colorado sets a two year minimum statute of limitations for actions based on federally created liabilities. *See supra* note 40.

61. 676 F.2d 1338 (10th Cir. 1982).

62. OKLA. STAT. tit. 51, §§ 151-170 (1981). The six-month limitation period is located at *id.* § 156.

63. 676 F.2d at 1343. The court also observed that states generally cannot require plaintiffs to "jump through procedural hoops" in order to assert a federal civil rights claim. *Id.* (quoting Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1162 (9th Cir. 1976) (en banc)).

64. The Political Subdivision Tort Claims Act was offered only as an alternate ground for upholding the trial court's FED. R. CIV. P. 12(b)(6) dismissal of plaintiff's suit. 676 F.2d at 1342.

65. 694 F.2d at 1342-43 (citing Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring) (deprivation of constitutional right different from, and more serious than, mere tort); Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977) (limitation periods must be generous to preserve Act's remedial purposes); Sethy v. Alameda County Water Dist., 454 F.2d 1157 (9th Cir. 1976) (civil rights plaintiffs not subject to state "procedural hoops"); Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970) (civil right not analogous to state created right to recover for municipality's torts)).

B. *Recent Cases*

1. *Jones v. Hildebrant*

In January, 1983 the Tenth Circuit decided *Jones v. Hildebrant*,[66] an appeal from the United States District Court for the District of Colorado. Ruby Jones brought suit under section 1983 as special administrator of the estate of her son, who was killed by a Denver police officer. The district court's decision to hold that the claim was barred by the statute of limitations was reached by characterizing the facts of the complaint as analogous to the torts of assault and battery, which are subject to a one-year statute of limitations under Colorado law.[67] The court then applied a Colorado statute creating a two-year limitation for a federally created liability unless the period for comparable actions under Colorado law is longer.[68] Because the limitation for the comparable action (assault and battery) was only one year, the two-year period was deemed appropriate. Mrs. Jones' action was dismissed by the district court, however, because more than five years had passed since the death of her son.[69]

The Tenth Circuit reversed this ruling on the ground that the plaintiff's cause of action was more properly characterized as analogous to the tort of reckless misconduct, and thus subject to a six-year limitation.[70] In addition, the court found that application of the longer statute of limitations "comports more favorably with the intent of Congress when it enacted civil rights remedies."[71] The court reiterated the policy expressed in *Shah v. Halliburton Co.* that when there appears to be a choice between two different characterizations, the longer statute of limitations should be applied "to effectuate the broad purpose of civil rights legislation."[72]

2. *Clulow v. Oklahoma*

Clulow brought suit under sections 1983 and 1985 against the State of Oklahoma and various individual defendants for alleged violations of his due process rights resulting in involuntary commitments to mental institutions and suspension from the Oklahoma Bar Association.[73] In his appeal to the Tenth Circuit, Clulow conceded that the trial court's application of a two-year statute of limitations was correct, but argued that a tolling provision should apply.[74] Nevertheless, the Tenth Circuit discussed and determined which Oklahoma statute of limitations was appropriate in this case. The court stated that the only two available limitations periods were a one-

66. No. 80-2220 (10th Cir. January 27, 1983). Although *Jones* was not selected for official publication, it retains precedential value equal to a published opinion. 10TH CIR. R. 17(c).

67. COLO. REV. STAT. § 13-80-102 (1973).

68. *Id.* § 13-80-106.

69. No. 80-2220, slip op. at 5.

70. *See* COLO. REV. STAT. § 13-80-110 (1973). *See also* Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 525 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979) (applying section 13-80-110 to claim of reckless misconduct).

71. No. 80-2220, slip op. at 7.

72. *Id.* at 8.

73. Clulow v. Oklahoma, 700 F.2d 1291, 1293 (10th Cir. 1983).

74. *Id.* at 1299. The court rejected Clulow's tolling argument after finding that his claims did not involve continuing torts and that there was no showing of concealment. *Id.* at 1300-01.

year period provided for intentional torts, or a two-year period provided for "injury to the rights of another."[75] Following the *Zuniga* approach, which requires a determination of the analogous action under state law, the court found that the applicable limitation was Oklahoma's two-year period for "injury to the rights of another."[76] The court justified its choice, by stating that "most of plaintiff's claims can be characterized as specific torts such as false imprisonment only by rather loose analogy. The more general tort of interference with individual rights . . . is a better analogue."[77]

3. *Garcia v. University of Kansas*

Garcia's section 1981 and section 1983 employment discrimination suit, *Garcia v. University of Kansas*,[78] was dismissed by the district court as barred by a Kansas two-year limitation for actions based on injury to the rights of another.[79] The Tenth Circuit affirmed, stating that the courts, by characterizing the cause of action as an alleged violation of the plaintiff's constitutional rights, should not be concerned with either how the rights were violated, the status of the defendant, or the manner in which the cause of action was created.[80] The court concluded "that the nature of the cause of action is the fundamental consideration."[81] Citing *Crosswhite v. Brown*[82] and *Wilson v. Hinman*,[83] two previous Tenth Circuit decisions addressing the applicable statute of limitations in section 1983 actions, the court stated that "injury to the rights of another" most nearly described the nature of plaintiff's cause of action.[84] Hence, the two-year limitation was applicable.[85]

Judge Seymour dissented, stating that the majority opinion could not be reconciled with *Shah* and *Zuniga*.[86] The dissent expressed the view that both *Shah* and *Zuniga* require an analysis of the particular allegations of the claim, rather than the "rote utilization of a single type of limitations statute."[87] Judge Seymour further asserted that the standard adopted by the majority may present difficulties in some of the states in the Tenth Circuit because of the diversity among the state statutes of limitations. She observed that Colorado, Utah, and New Mexico laws, for example, did not contain a provision similar to the Kansas, Oklahoma, and Wyoming limitations period provided for injury to the rights of another.[88] Judge Seymour recognized that varying limitations periods between states were permissible under the

75. *Id.* at 1299. *See* OKLA. STAT. tit. 12, § 95 para. 3 (1981) (two-year period for injuries to rights of another); *id.* § 95 para. 4 (one-year period for intentional torts).
76. 700 F.2d at 1299. *See* OKLA. STAT. tit. 12, § 95 para. 3 (1981).
77. 700 F.2d at 1299. The court also noted that the two-year limitation was not "so unreasonably short as to defeat federal policy." *Id.* at 1300 n.12.
78. 702 F.2d 849 (10th Cir. 1983).
79. *Id.* at 850. *See* KAN. STAT. ANN. § 60-513(a)(4) (1976).
80. 702 F.2d at 850.
81. *Id.*
82. 424 F.2d 495 (10th Cir. 1970).
83. 172 F.2d 914 (10th Cir.), *cert. denied*, 336 U.S. 970 (1949).
84. 702 F.2d at 851.
85. *Id.*
86. *Id.* (Seymour, J., dissenting).
87. *Id.*
88. *Id.* at 853.

Civil Rights Acts,[89] but felt that a consistent analytical framework for choosing the most analogous state limitation was nonetheless necessary.[90] Applying the framework adopted in *Zuniga*, Judge Seymour concluded that Garcia's claim could be characterized as either an action for injury to the rights of another (two-year limitation),[91] or an action upon a liability created by statute (three-year limitation).[92] Under the rationale of *Shah*, the longer statute should have been applied.[93]

III. CRITIQUE

A. *Consistency Within the Tenth Circuit*

Judge Seymour correctly observed that the majority opinion in *Garcia* has deviated from the direct analogy approach announced in *Zuniga*. *Zuniga* emphasized that the analogous state statute of limitations should be selected after "analysis of the particular allegations of the claim,"[94] that "critical analysis of the particular claim" was necessary,[95] and that prior Tenth Circuit decisions had pointed the way to the direct analogy approach by "detailing the allegations of unconstitutional acts."[96] Further, *Zuniga* rejected the uniform analogy approach, which requires a court to determine the state analogue for an entire class of civil rights violations.[97] Thus, Chief Judge Seth's majority opinion, insofar as its emphasis on ascertaining the *nature* of the civil rights violation[98] is indicative of the use of a uniform analogy approach,[99] has created an inconsistency within the Tenth Circuit.

Although Judge Seymour's dissent in *Garcia* highlights the majority's failure to follow *Zuniga*, her criticism fails to acknowledge that the Tenth Circuit had previously deviated from the direct analogy approach in *Spiegel*, *Hansbury*, and *Brown*. These three decisions are indicative of the uniform analogy approach because no attempt was made to analogize the civil rights claim to its comparable state analogue.[100] Thus, it would appear that *Garcia* crystallizes two inconsistent lines of precedent which had previously arisen in the Tenth Circuit: *Zuniga*, *Shah*, *Jones*, and *Clulow* adhere to the direct analogy approach, while *Hansbury*, *Spiegel*, *Brown*, and *Garcia* follow the uniform approach.[101] The state of law in the Tenth Circuit is even more complex

89. *Id.* (citing Board of Regents v. Tomanio, 446 U.S. 478, 489 (1980)).
90. 702 F.2d at 853 (Seymour, J., dissenting).
91. *Id. See* KAN. STAT. ANN. § 60-513(a)(4) (1976).
92. 702 F.2d at 853 (Seymour, J., dissenting). *See* KAN. STAT. ANN. § 60-512(2) (1976).
93. 702 F.2d at 853 (Seymour, J., dissenting).
94. 570 F.2d at 383.
95. *Id.*
96. *Id.*
97. *See* Beard v. Robinson, 563 F.2d 331, 336 (7th Cir. 1977). *Zuniga* explicitly rejected the *Robinson* approach. 570 F.2d at 383.
98. *See* 702 F.2d at 850.
99. *Cf. Garcia*, 702 F.2d at 852-53 (Seymour, J., dissenting) (Tenth Circuit precedent rejects an approach failing to analyze particular allegations of a claim; therefore "rote utilization" of a particular limitations statute is improper).
100. *See supra* notes 17-20 and accompanying text.
101. The difference in approach cannot be explained solely by the make-up of the panels hearing the cases. In fact, the same judges have participated in opinions following both approaches. For example, Judge Barrett joined the opinions in *Brown* and *Spiegel* as well as *Zuniga*.

than indicated by the existence of conflicting precedents, however, because there are numerous inconsistencies within each line of precedent.

The uniform approach requires the court to designate one characterization which will serve as the state analogue for all civil rights actions. This characterization should apply uniformly to all states within a circuit.[102] Rather than select one statute as appropriate for civil rights actions, the Tenth Circuit cases following the uniform analogy approach have vacillated among various possibilities and applied three different types of statutes of limitations. *Hansbury* utilized New Mexico's statute for actions founded on unwritten contract or not otherwise provided for.[103] *Spiegel* was decided in the same year as *Hansbury*, yet the court selected a two-year limitation period for actions based on liabilities created by federal statute.[104] Several months after *Spiegel*, *Brown* ignored the Kansas limitation for liability created by statute and applied the limitation period for injury to the rights of another.[105] Thus, there is clearly a lack of uniformity among the cases which apparently follow the uniform approach.[106]

Similarly, the Tenth Circuit has also misapplied the direct analogy approach. This approach requires the court to examine the facts underlying the complaint and then select the most comparable common law tort or contract action.[107] In applying this approach, the Tenth Circuit has often found the most analogous state cause of action to be a general characterization, which is indicative of the uniform approach, rather than a specific common law tort. For example, Judge Seymour's dissent in *Garcia* suggests that the appropriate state analogue is "an action upon liability created by statute"[108] rather than an action upon an implied contract.[109] In *Shah*, Judge Seymour also held that a section 1981 claim "can clearly be construed as one based upon a liability created by statute."[110] These statements are indicative of the uniform analogy approach, despite the fact that the direct analogy approach is purportedly being followed.

Finally, *Childers* adds to the difficulties facing litigants involved in civil

---

Chief Judge Seth also joined the opinion in *Zuniga* before he embraced the uniform analogy approach in *Garcia*.

102. The fact that all states in a circuit do not have identical statutes does not preclude application of the uniform approach. For example, the Ninth Circuit has uniformly applied the limitation for liabilities created by statute. Washington has no such statute. Therefore, the circuit court examined Washington's statutes of limitation and found that the limitation governing injury to the person or rights of another best serves the interests which section 1983 was designed to protect. *See* Rose v. Rinaldi, 654 F.2d 546 (9th Cir. 1981).

103. N.M. STAT. ANN. § 37-1-4 (1978).

104. WYO. STAT. § 1-3-115 (1977).

105. KAN. STAT. ANN. § 60-513(a)(4) (1976).

106. Ironically, Spiegel's claim would have been timely if the Wyoming limitation for "injuries to the rights of the plaintiff," WYO. STAT. § 1-3-105 (1977), had been applied. Similarly, Brown's claim would have been timely if the court had applied Kansas' limitation period for actions upon a liability created by statute, KAN. STAT. ANN. § 60-512(2) (1976).

107. *Zuniga* adopted the Third Circuit approach, which requires the court to "assess the similarity of the various state law torts." Meyers v. Pennpack Woods Home Ownership Ass'n, 559 F.2d 894, 901 (3d Cir. 1977), *adopted in Zuniga*, 580 F.2d at 383.

108. 702 F.2d at 853 (Seymour, J., dissenting); *see* KAN. STAT. ANN. § 60-512(2) (1976).

109. *See* KAN. STAT. ANN. § 60-512(1) (1976). Although both provisions have identical limitations periods, the problem with Judge Seymour's dissent is her methodology, not her result.

110. 627 F.2d at 1059.

rights actions in the Tenth Circuit. By emphasizing the intrinsic difference between federal civil rights actions and state tort actions,[111] *Childers* increases the uncertainty in determining the appropriate state analogue. Moreover, *Childers* rejected the limitations period of the Oklahoma Political Subdivision Tort Claims Act by citing authority which contradicts the conceptual framework of the direct analogy approach.[112]

B. *Problematic Aspects of the Direct Analogy Approach*

Despite the inconsistencies in the Tenth Circuit opinions, the direct analogy approach remains the only method the court has explicitly approved for determining the applicable statute of limitations in a federal civil rights action. This section examines some problems inherent in the direct analogy approach, and then discusses the implications of those problems in terms of the policies served by the federal civil rights acts specifically, and statutes of limitations generally.

1. State Court Decisions in Civil Rights Actions

Federal courts using the direct analogy approach must give deference to a state court's characterization of that state's statute of limitations analogue.[113] Essentially, unless the state court's characterization is unreasonable or inconsistent with federal policy, federal courts must follow the state decision.[114] Several recent state court decisions have rejected analogues selected by the Tenth Circuit and the federal district courts within its jurisdiction,[115] thereby creating a possibility of increased inconsistency within the Tenth Circuit.

In *DeVargas v. State ex rel. New Mexico Department of Corrections*,[116] the New Mexico Court of Appeals held that the two-year limitation period of the New Mexico Tort Claims Act[117] was applicable to a section 1983 suit against a New Mexico state employee.[118] *DeVargas* rejected the analysis set out by the United States District Court for the District of New Mexico in an earlier case, which had held that state tort claims acts are based on state concepts of sovereign immunity alien to the purposes to be served by the

111. *See supra* notes 63-65 and accompanying text.

112. See *Childers*, 676 F.2d at 1343 (citing Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977); Sethy v. Alameda County Water Dist., 545 F.2d 1157 (9th Cir. 1976) (en banc); Donovan v. Riebold, 433 F.2d 738 (9th Cir. 1970); *see also* Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring), *cited in Childers*, 676 F.2d at 1343.

113. *See* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 706 (1965), *quoted in Zuniga*, 580 F.2d at 383.

114. *Hoosier Cardinal*, 383 U.S. at 706, *quoted in Zuniga*, 580 F.2d at 383.

115. DeVargas v. State *ex rel.* New Mexico Dep't of Corrections, 97 N.M. 450, 640 P.2d 1327 (1981), *cert. dismissed as improvidently granted*, 97 N.M. 563, 642 P.2d 167 (1982); Miller v. City of Overland Park, 231 Kan. 557, 646 P.2d 1114 (1982). Federal and state courts have concurrent jurisdiction under the federal civil rights statutes. S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION 16 (1979).

116. 97 N.M. 447, 640 P.2d 1327 (1981), *cert. dismissed as improvidently granted*, 97 N.M. 563, 642 P.2d 167 (1982).

117. N.M. STAT. ANN. §§ 41-4-1 to -29 (1978). The two-year limitation period is located at § 41-4-15.

118. 97 N.M. at 451, 640 P.2d at 1331.

Civil Rights Acts, and therefore cannot provide the statute of limitations in a section 1983 action.[119] The New Mexico Court of Appeals rejected this reasoning and held that the tort claims act is consistent with the purposes of section 1983, because the act is based on a waiver of immunity which subjects law enforcement officials to liability, consistent with the purposes of section 1983.[120] The New Mexico Supreme Court later dismissed DeVargas' petition for certiorari, finding no fault with the analysis used by the Court of Appeals.[121]

Miller v. City of Overland Park,[122] a 1982 Kansas Supreme Court decision, held that plaintiff's section 1983 suit was comparable to a state suit for false arrest and thus subject to a one-year statute of limitations.[123] Although the Kansas Supreme Court recognized that in *Wilson v. Hinman* and *Brown v. Bigger* the Tenth Circuit had applied Kansas' two-year statute of limitations to section 1983 actions,[124] the supreme court concluded that "when our legislature has specifically adopted a lesser period of time for certain specific types of action, we believe such time limits should also apply to a § 1983 cause of action. . . ."[125] Although the court justified its decision by distinguishing *Hinman* and *Brown*,[126] it clearly rejected the Tenth Circuit's policy of using the longer of two possible limitations periods.[127]

Both *DeVargas* and *Miller* reject federal precedent, *DeVargas* explicitly[128] and *Miller* implicitly.[129] According to the rationale of *Zuniga* the Tenth Circuit should accept the state courts' characterizations and apply Kansas' one-year statute of limitations if similar civil rights actions similar to the *Miller* case arise in Kansas, and the New Mexico Tort Claims Act's two-year limitation for New Mexico cases similar to *DeVargas*. Thus, the analogy approach might require the circuit to abandon its own precedent, and instead adopt the rulings of the state courts.[130]

---

119. *See* Gunther v. Miller, 498 F. Supp. 882 (D.N.M. 1980).

120. 97 N.M. at —, 640 P.2d at 1331. One commentator, however, after analyzing *Gunther* and *DeVargas* concluded: "[T]he thrust of state tort law, with its immunity doctrines, is in direct opposition to the purposes of section 1983." Kovnat, *Constitutional Torts and the New Mexico Tort Claims Act*, 13 N.M.L. REV. 1, 50 (1983).

121. *See* DeVargas v. State *ex rel.* New Mexico Dep't of Corrections, 97 N.M. 563, 642 P.2d 167 (1982). *DeVargas* has been criticized by New Mexico commentators as failing to accomodate the federal policy concerns present in federal civil rights actions, Kovat, *supra* note 120, at 45-50, and as a source of confusion and inconsistency for New Mexico civil rights litigants. Comment, *Federal Civil Rights Act—The New Mexico Appellate Courts' Choice of the Proper Limitations Period for Civil Rights Actions Filed Under 42 U.S.C. § 1983:* DeVargas v. State *ex rel.* New Mexico Department of Corrections, 13 N.M.L. REV. 555, 561-65 (1983).

122. 231 Kan. 557, 646 P.2d 1114 (1982).

123. *Id.* at 562-63, 646 P.2d at 118. *See* KAN. STAT. ANN. § 60-514(2) (1976).

124. Kansas provides a two-year limitation period for actions based on injuries to the rights of another, KAN. STAT. ANN. § 60-513(a)(4) (1976).

125. 231 Kan. at 562, 646 P.2d at 1118.

126. *Id.* at 560, 646 P.2d at 1118.

127. *See, e.g., Shah*, 627 F.2d at 1059; *Brogan*, 588 F.2d at 410.

128. *See supra* text accompanying notes 117-19. *DeVargas* also implicitly rejected *Hansbury*, which had applied a four-year statute of limitations to a section 1983 action brought in New Mexico district court. *See supra* notes 40-41 and accompanying text.

129. *See supra* text accompanying note 125.

130. *Miller* stated that its characterization of the state law analogue was binding on the federal courts, 231 Kan. at 559, 562, 646 P.2d at 118. This statement is incorrect. *See supra* notes 6 and 31 and accompanying text.

2. Minimal Time Period

In determining the appropriate statute of limitations for a civil rights action, the court should take account of policy considerations relating to the federal civil rights statutes. The Tenth Circuit has stated that when there is a choice between several seemingly appropriate statutes of limitations, the longer statute should apply in light of the policy protecting fundamental rights.[131] Additionally, the Tenth Circuit has stated that the state statute of limitations must be "sufficiently generous in the time periods to preserve the remedial spirit of federal civil rights actions."[132] The court, however, has not clearly defined the minimal time period which would be consistent with the policy of the civil rights statutes.

Some circuits have applied a general rule that a federal court should not select a state statute of limitations shorter than two years in a civil rights action.[133] The Tenth Circuit has not officially adopted this principle, but there has never been a case in which the circuit approved the application of a limitation period of less than two years. There are states within the Tenth Circuit, however, which have time limitations of less than two years for certain tort actions which are most analogous to some civil rights claims. For example, several states in the Tenth Circuit provide a one-year limitation for intentional torts such as false imprisonment, assault, and battery, which might be applicable to a civil rights action.[134] Many section 1983 actions resulting from wrongful conduct by police officers will be comparable to these torts. Thus, the circuit court might be faced with the option of applying a one-year limitation, or of deviating from the approach of selecting the comparable cause of action under state law. This problem does not arise under the uniform analogy approach, because the applicable limitation period is selected after consideration of the appropriate minimal time period.[135]

3. Fragmentation of the Civil Rights Claim

Another problem that often arises in civil rights cases is that the allegations of the complaint may be comparable to several actions, which are subject to different statutes of limitations under state law. Again, this problem

131. *See Shah*, 627 F.2d at 1059; *Brogan*, 588 F.2d at 412.

132. *Childers*, 676 F.2d at 1343 (citing Shouse v. Pierce County, 559 F.2d 1142, 1146 (9th Cir. 1977)).

133. Pauk v. Board of Trustees, 654 F.2d 856, 862 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) (stating that the two-year limitations of 28 U.S.C. §§ 1346(b), 2680(h) (1976) are an expression of federal policy which should establish a floor for section 1983 suits).

134. *See* KAN. STAT. ANN. § 60-514(2) (1976); OKLA. STAT. tit. 12, § 95 para. 4 (1981); UTAH CODE ANN. § 78-12-29(4),(5) (1953). Note, however, that Utah provides a two-year limitation for actions brought against peace officers for injuries caused in their official capacity. UTAH CODE ANN. § 78-12-28(1) (1953). New Mexico does not provide a one-year limitation for intentional torts. Both Colorado and Wyoming provide at least a two-year limitation for actions based on liabilities created by federal statute, *see* COLO. REV. STAT. § 13-80-106 (1973); WYO. STAT. § 1-3-115 (1977), although under a pure direct analogy approach those statutes would be irrelevant. *Cf. supra* notes 106-08 and accompanying text (criticizing Tenth Circuit for failing to analogize claim to its particularized state analogue).

135. *See, e.g.*, Garmon v. Faust, 668 F.2d 400 (8th Cir.) (en banc), *cert. denied*, 456 U.S. 998 (1982).

often arises in cases based on the wrongful conduct of law enforcement officers.

The Tenth Circuit has never addressed the issue of whether fragmentation of a federal civil rights claim is consistent with the policy of the Civil Rights Acts. The direct analogy approach would require that "each aspect of the complaint . . . be given separate statute of limitations treatment depending on the nature of the specific act or acts complained of."[136] The District of Columbia Circuit recently followed this approach, characterizing each of the plaintiff's allegations separately and then applying the statute of limitations for the analogous common law action.[137] This resulted in a different limitation period for the seizure and conversion, false-arrest, and assault components of the claim.[138] It is questionable whether the federal policy behind the civil rights statutes is promoted by dividing a claim for the violation of constitutional rights into components according to their common law counterparts.[139]

4. Compatibility of the Direct Analogy Approach with the Policies of the Civil Rights Acts

Another policy question which the Tenth Circuit has not adequately addressed is whether the very method of drawing an analogy between the deprivation of a civil right and a common law tort or contract claim is consistent with the purpose of the civil rights laws. *Childers* observed that "[s]tate legislatures do not devise their limitations period with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies."[140] While this statement is particularly apt in a situation like that of *Childers*, where the defendant argued for application of the exceptionally short limitation period provided in a state tort claims act, the rationale could easily extend to other instances in which specific state statutes of limitations do not adequately reflect the interests protected by federal civil rights statutes.

Rather than directly confront this problem, the Tenth Circuit has evaded the issue by rationalizing its rejection of analogies to certain state causes of action. For example, in *Clulow* the court was apparently convinced that Oklahoma's one-year limitations period for intentional torts[141] was too short in light of the purposes of section 1983. The court resolved this conflict by concluding that the plaintiff's claim, which arose from his involuntary

136. Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 901 (3d Cir. 1977) *cited in Zuniga*, 580 F.2d at 383.

137. McClam v. Barry, 697 F.2d 366 (D.C. Cir. 1983).

138. *Id.* at 370.

139. In this regard, the Ninth Circuit has declared:

> Inconsistency and confusion would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several differing periods of limitation applicable to each state-created right were applied to the single federal cause of action.

Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962).

140. 676 F.2d at 1342 (quoting Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977)).

141. OKLA. STAT. tit. 12, § 95 para. 4 (1981).

commitment to a mental institution, was not comparable to the tort of false imprisonment because the analogy was too "loose."[142] The ultimate policy consideration which must be examined, however, is whether common law tort and contract actions are indeed comparable to civil rights violations.[143]

In rejecting the limitations of Oklahoma's state tort claims act, *Childers* quoted Justice Harlan's famous statement: "[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."[144] In a similar vein, the Eighth Circuit has rejected the tort analogy because it "unduly cramps the significance of section 1983 as a broad, statutory remedy."[145] The Seventh Circuit has also held that the analogy approach is inappropriate because of the "fundamental differences between a civil rights action and a common law tort."[146] Aside from the practical difficulties in finding a common law analogy for some civil rights claims, such as those in *Spiegel* involving the violation of first amendment rights, it is clear that serious doubts exist as to whether the very process of comparing a civil rights claim to a common law action is compatible with the spirit of the civil rights statutes.[147]

5. Compatibility of the Analogy Approach with the Policies of Statutes of Limitations

In addition to policy considerations relating specifically to the Civil Rights Acts, there are pervasive social policies implicated by statutes of limitation. The Supreme Court stated in *Board of Regents v. Tomanio*[148] that "[s]tatutes of limitations are not simply technicalities. . . . [t]hey have long been respected as fundamental to a well-ordered judicial system."[149] The Court went on to observe that state statutes of limitation serve two primary purposes. First, they represent a legislative judgment about the point at which delay in bringing a claim will impair the accuracy of the fact-finding process.[150] Second, they prevent undue delay in bringing claims, thereby

142. *See* 700 F.2d at 1300.

143. *Zuniga* recognized that there are differences between a civil rights claim and a tort or contract action, but concluded that these differences did not preclude application of the direct analogy approach. 580 F.2d at 386.

144. Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). *See* 676 F.2d at 1343.

145. Garmon v. Foust, 668 F.2d 400, 406 (8th Cir.) (en banc), *cert. denied*, 456 U.S. 998 (1982).

146. Beard v. Robinson, 563 F.2d 331 (7th Cir.), *cert. denied*, 438 U.S. 907 (1977).

147. This view is not supported by Supreme Court cases. The Court has stated that there is nothing peculiar to civil rights actions that would justify special reluctance in applying state law. Johnson v. Railway Express Agency, 421 U.S. 454, 464 (1975). Despite this statement, the Supreme Court has continually refused to rule on questions involving the choice of an applicable statute of limitations in civil rights actions, leaving the resolution of the issue to the discretion of the circuit courts. *See supra* notes 7-9 and accompanying text.

148. 446 U.S. 478 (1980).

149. *Id.* at 487.

150. *Id.* The accuracy of the fact-finding process is impaired because testimony becomes increasingly unreliable as time passes. *Id.*

settling expectations and preventing litigation of stale claims.[151]

Several circuit courts have addressed the relevance of the evidentiary problem in selecting the appropriate statute of limitations in a civil rights action. For example, the Third Circuit noted that because a section 1981 violation typically involves documentary proof and a section 1982 claim depends heavily on statistical evidence, a longer statute of limitations is less likely to impede the proof of facts in section 1981 actions.[152] In contrast, the District of Columbia Circuit has declared that in a civil rights suit against police officers there are no unique aspects which would make general judicial policies inapplicable to civil rights actions.[153]

The Tenth Circuit has never discussed the relationship between the statute of limitation in a particular civil rights action and the type of evidence necessary to prove the allegations of the complaint. Nor has the Tenth Circuit examined the possibility, suggested by the Third Circuit, that evidentiary considerations may require a different standard for determining a section 1981 or section 1982 statute of limitations than would be required for a section 1983 claim.[154]

The second purpose of statutes of limitation is to protect defendants from the burden of defending against stale claims and to promote finality and order in the judicial system.[155] It has also been suggested that statutes of limitations benefit plaintiffs by providing "a sure knowledge of the time after which a suit would be futile."[156] One commentator has observed that in jurisdictions which have adopted the direct analogy approach the uncertainty regarding the applicable statute of limitations in civil rights actions has served to encourage plaintiffs to bring suits which might not otherwise be brought and to appeal adverse decisions.[157] A prospective plaintiff could be advised to litigate a claim if there is any conceivable statute of limitation under which his suit would be considered timely. Because the Tenth Circuit standard is so amorphous, there is always a possibility that a claim will not be barred if the limitation period has not run for some tort or contract action arguably comparable to the plaintiff's civil rights claim.[158] Similarly, litigants are encouraged to appeal, due to the chance that the Tenth Circuit

151. *See id.*

152. Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 903 n.26 (3d Cir. 1977).

153. *See* McClam v. Barry, 697 F.2d 366 (D.C. Cir. 1983).

154. *See supra* note 149 and accompanying text.

155. United States v. Oregon Lumber Co., 260 U.S. 290 (1922). *See also Tomanio*, 446 U.S. at 487.

156. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1186 (1950).

157. Comment, *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L. J. 97, 112 n.116.

158. An additional source of confusion is the fact that the Tenth Circuit rarely provides an unequivocal statement of the analogy which is drawn between the state action and the civil rights suit. This lack of precision is typified by the court's statement in *Shah*: *"Zuniga* appropriately defines a section 1981 claim for discriminatory discharge from employment as having the elements of both a contract and a tort claim. . . . [f]urthermore, the cause of action can clearly be construed as one based upon a liability created by statute." 627 F.2d at 1059. The court in *Shah* ultimately applied the Oklahoma statute applicable to contract actions and actions upon a liability created by statute, but never indicated which of these provided the appropriate analogy with the civil rights claim. *Id.*

might disagree with the trial court's characterization of most analogous action under state law. The *Jones* decision is illustrative of this situation.[159] Under the *Zuniga* approach, then, litigants can never be certain whether or not the limitation has expired on a particular claim because one cannot predict which analogy the Tenth Circuit will deem most appropriate.

IV. CONCLUSION

Zuniga's direct analogy approach allows greater flexibility in determining whether an action is barred than does the uniform analogy approach. *Shah* requires a court to apply the longer limitation when a substantial question exists over which state statute applies.[160] This method seems to weigh in favor of protecting the interests of plaintiffs who may have valid claims rather than the interests of defendants in having to defend against stale claims.[161] The danger of this method, however, is that a court might—either consciously or unconsciously—manipulate the statute of limitations according to its evaluation of the merits of a claim.

Additionally, although the Tenth Circuit has ostensibly adopted the direct analogy approach for determining the applicable statute of limitations in civil rights cases, the court's inconsistent application of this standard has led to a confusing line of precedent.[162] This confusion has produced an intolerable situation in which civil rights litigants have no meaningful grounds for determining whether or not an action is barred by the statute of limitations. The situation has been further complicated by state court decisions in Kansas, and New Mexico, which will force the Tenth Circuit to decide whether to accept a state's designation of the appropriate statute of limitations in certain civil rights cases as binding on the federal courts.[163]

The optimal solution to this problem would be a congressional enactment[164] providing a uniform statute of limitations for all civil rights actions.[165] Absent any legislative action, and in view of the Supreme Court's refusal to set a standard in this area, the responsibility for developing reasonable guidelines rests with the circuit courts.

After a period of inconsistent opinions, both the Seventh and Eighth Circuits decided that the uniform approach is the most compatible with the policies of the civil rights statutes.[166] The Tenth Circuit, which has never

159. *See supra* notes 66-72 and accompanying text.

160. 627 F.2d at 1059.

161. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 463-64 (1975).

162. *See supra* notes 100-10 and accompanying text.

163. *See supra* notes 113-28 and accompanying text.

164. Precedent for congressional action is found in the antitrust area, where the federal courts had traditionally applied state statutes of limitations. *E.g.*, Englander Motors Inc. v. Ford Motor Co., 293 F.2d 802, 804 (6th Cir. 1961). In 1955, Congress enacted a four-year limitation period to govern all antitrust actions. *See* Pub. L. No. 138, 69 Stat. 283 (1955) (codified as amended at 15 U.S.C. § 15b (1982).

165. In this regard, one commentator has stated: "Congress should enact at once a period of limitation to make uniform throughout the country the time when suits can be brought under § 1983." C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS: CIVIL PRACTICE § 241 (2d ed. 1980).

166. *See* Garmon v. Foust, 668 F.2d 400 (8th Cir.) (en banc), *cert. denied* 456 U.S. 998 (1982); Beard v. Robinson, 563 F.2d 331 (7th Cir.), *cert. denied*, 438 U.S. 907 (1977).

adequately addressed these policy considerations, should follow these circuits[167] and abandon the direct analogy approach, which has become a source of uncertainty and confusion.[168]

Marcie Bayaz

167. An authority on civil rights actions has observed: "Inasmuch as tort principles do not and should not invariably determine 1983 liability in other areas, *Beard* represents the better rule." NAHMOD, *supra* note 115, at 128.

168. In a decision received after this issue went to press, the Tenth Circuit adopted the uniform analogy approach for section 1983 actions. Henceforth, those actions will be subject to the statute of limitations provided for injuries to personal rights. Garcia v. Wilson, No. 83-1017, slip op. at 27 (10th Cir Mar. 30, 1984).